State Tailor Sdn Bhd v Nallapan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C–02–602 OF 1998
RICHARD MALANJUM, HASHIM YUSOFF AND TENGKU BAHARUDIN SHAH JJCA
23 FEBRUARY 2005

Civil Procedure — Appeal — Retrial — Grounds for — No written judgment from trial court — Neither party raised issue of prejudice

Civil Procedure — Pleadings — Defence — No prayer on matter in statement of defence — Whether court can decide on matter — Duty of court — Party bound by own pleadings

Land Law — Indefeasibility of title and interest — Fraud — Signature in Borang 14A not owner's signature — Borang 14 accepted by Land Office for registration — Whether person signing has power of attorney — Whether acting as power of attorney — Whether constitutes valid transfer — Bona fide Purchaser for value — National Land Code s 340 (3)

The second defendant/appellant appealed from the decision of the High Court granting the plaintiff/respondent, *inter alia*, the following orders: (i) that the appellant to re-transfer the land to the plaintiff; and (ii) the first defendant to repay the full purchase price for the land to the second defendant. Counsel for the appellant submitted that the orders ought to be reversed on the grounds, *inter alia*: (i) that the appellant had acquired the indefeasible title to the land vide borang 14A signed by first defendant as attorney for the plaintiff; (ii) the Land Office had registered the borang 14A; (iii) failure to register the power of attorney with the Land Office at the time of transfer was not fatal and could be rectified; (iv) there was no prayer for declaration to invoke s 340 (2)(b) of the National Land Code ('NLC'); and (v) the respondent had ratified the sale of the land by the ratification agreement entered into by the first defendant and the respondent. The issues before the court to decide were: (i) what was the status of the signature of the first defendant in the borang 14A; (ii) whether the first defendant in fact signed the borang 14A as the attorney for the respondent pursuant to the power of attorney; (iii) that if the appellant had acquired the title or interest in the subject land through a forged instrument, could it not rely on the doctrine of bona fide purchaser for value housed in the proviso to s 340 (3) of NLC; and (iv) whether the ratification agreement was of any assistance to the appellant to maintain its title or interest on the land.

Held, dismissing the appeal with costs:

(1) On plain reading of the borang 14A that bore the signature of the first defendant and presented for registration, the inevitable conclusion would be that the signature represented to the whole world that it belonged to the respondent. Obviously the Land Office perceived that to be the case when the borang 14A was accepted for registration. Without the signature

the instrument would have been incomplete. Thus, the insertion of his signature by the first defendant without more and thus representing to be the transferor is a plain forgery. Hence s 340 (2)(b) of the NLC is relevant and applicable (see para 28).

(2) Based on the evidence of the first defendant it could not be said that when he signed the borang 14A he had the power of attorney in mind or that he was doing so as the attorney of the respondent. Hence if the signatory himself did not assert such a fact it would be unjustified to conclude or even assume without further proof that he did (see para 36).

(3) As the appellant in the statement of defence did not plead or rely on the doctrine of *bona fide* purchaser for value and reliance on the ratification agreement, therefore, there is necessity for the court to deal with the issues since the court is guided by the basic procedural principle in that a party in a suit is bound by its own pleadings (see paras 46 and 49).

Orbiter on retrial issue:

In the instant appeal, the primary issues involve were question of law requiring no or minimum findings on undisputed facts. The undisputed facts and admitted facts together with the documentary evidence tendered during the trial were more than sufficient materials upon which the answers to the issues raised by the respective parties could be found thereby determining the fate of the orders granted by the trial court. Moreover, neither of the parties ever raised the issue of being prejudiced by the absence of a written judgment from the trial court. Thus, a retrial would serve no purpose other than to cause further delay and injustice to the parties since the case was filed in 1986 (see paras 4, 5 and 6).

[**Bahasa Malaysia summary**

Perayu/defendan kedua merayu terhadap keputusan Mahkamah Tinggi yang membenarkan perintah-perintah berikut kepada responden/plaintif, yang antara lainnya adalah: (i) bahawa perayu hendaklah memindahmilikkan semula tanah tersebut kepada plaintif; dan (ii) defendan pertama hendaklah mengembalikan jumlah penuh harga belian tanah tersebut kepada defendan kedua. Peguam bagi perayu menghujahkan bahawa perintah-perintah wajar dikakas atas alasan-alasan yang antara lainnya adalah: (i) bahawa perayu telah mendapat hak milik yang tidak boleh sangkal tanah tersebut melalui borang 14A yang ditandatangani oleh defendan pertama sebagai wakil kepada plaintif; (ii) Pejabat Tanah telah mendaftarkan borang 14A tersebut; (iii) kegagalan mendaftar surat kuasa wakil di Pejabat Tanah semasa pindah milik tidaklah memudaratkan dan boleh dibetulkan; (iv) tiada terdapat permohonan untuk perisytiharan menggunakan s 340 (2)(b) Kanun Tanah Negara ('KTN'); dan (v) responden telah meratifikasikan penjualan tanah tersebut melalui perjanjian ratifikasi yang dimasuki oleh defendan pertama dan responden. Isu-isu yang perlu diputuskan oleh mahkamah adalah: (i) apakah status tandatangan defendan pertama di dalam borang 14A; (ii) sama

ada defendan pertama menandatangani borang 14A sebagai wakil kepada responden menurut surat kuasa wakil; (iii) bahawa perayu telah mendapat hak milik atau kepentingan di dalam tanah tersebut melalui surat cara yang dipalsukan, sama ada ini membolehkan beliau bergantung kepada doktrin pembeli *bona fide* dengan nilai sebagaimana yang diperuntukkan di dalam s 340 (3) KTN; dan (v) sama ada perjanjian ratifikasi boleh membantu perayu dalam mengekalkan hak miliknya atau kepentingannya di dalam tanah tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Membaca borang 14A yang mengandungi tandatangan defendan pertama dan yang dikemukakan untuk pendaftaran, ianya tidak boleh dielakkan dari membuat keputusan yang tandatangan tersebut memberi representasi kepada umum bahawa ianya milik responden. Jelasnya, Pejabat Tanah berfahaman demikian apabila borang 14A, tersebut diterima untuk pendaftaran. Tanpa tandatangan, surat cara tersebut tidak sempurna. Oleh yang demikian, dengan memasukkan tandatangannya tanpa apa-apa kecualian dan memberi representasi sebagai pemindahmilik adalah satu pemalsuan. Maka s 340 (2) (b) KTN adalah relevan dan terpakai (lihat perenggan 28).

(2) Berdasarkan keterangan defendan pertama ianya tidak boleh dikatakan pada ketika beliau menandatangani borang 14A beliau mempunyai kuasa wakil di dalam fikirannya atau beliau bertindak sebagai wakil kepada responden. Maka, jika penandatangan sendiri tidak mengatakan sedemikian, ianya adalah tidak adil untuk diputuskan atau dianggap tanpa sebarang bukti lain yang beliau bertindak sedemikian (lihat perenggan 36).

(3) Oleh kerana perayu tidak memohon atau bergantung kepada doktrin pembeli *bona fide* dengan nilai atau perjanjian ratifikasi di dalam pernyataan pembelaan beliau, maka, adalah tidak perlu bagi mahkamah untuk memutuskan isu tersebut kerana mahkamah berpegang kepada prinsip prosedur iaitu pihak di dalam sesuatu tindakan adalah terikat dengan plidingnya (lihat perenggan 46 dan 49).

Orbiter mengenai isu bicara semula:

Di dalam rayuan semasa, isu utama adalah persoalan undang-undang yang tidak memerlukan atau hanya memerlukan secara minimum pendapat-pendapat pada fakta yang tidak disangkal. Fakta-fakta yang tidak disangkal itu bersama dengan fakta yang diakui serta keterangan dokumen yang dikemukakan semasa perbicaraan adalah lebih dari mencukupi untuk menjawab isu-isu yang dibangkitkan oleh pihak-pihak dan memutuskan nasib perintah-perintah yang diberikan oleh mahkamah bicara. Tambahan pula, kedua-dua pihak tidak membangkitkan isu diprejudiskan kerana ketiadaan penghakiman bertulis dari mahkamah bicara. Maka, perbicaraan semula tidak akan memberi apa-apa manfaat selain dari menyebabkan kelewatan yang selanjutnya dan ketidakadilan kepada pihak-pihak memandangkan kes ini difailkan sejak 1986 lagi (lihat perenggan 4, 5 dan 6).]

Notes

For cases on retrial, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1176.
For cases on defence generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3493–3508.
For cases on fraud on indefeasibility of title and interests, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2667–2690, 2731.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241 (refd)
Cheong Khean Sheng v Public Prosecutor [1970] 2 MLJ 175 (refd)
Chiew Lip Seng v Perwira Habib Bank (M) Bhd [1999] 1 MLJ 310 (refd)
Choo Ah Kow v Yeow Yew Thiam [1989] 1 MLJ 187 (refd)
*Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Ano*r [1992] 1 MLJ 697 (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)
Gian Singh & Co Ltd v Banque De L'indochine [1974] 2 MLJ 177 (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23 (refd)
Mohamed bin Buyong v Pemungut Hasil Tanah Gombak & Ors [1982] 2 MLJ 53 (distd)
OCBC Bank (M) Bhd v Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 2 MLJ 511 (refd)
Ong Ban Chai & Ors v Seah Siang Mong [1998] 3 MLJ 346 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)
State Government of Perak v Muniandy [1986] 1 MLJ 490 (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (refd)
Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143 (refd)

Legislation referred to

National Land Code s 340, (2)(b), (3)
Powers of Attorney Act 1949 s 4

Appeal from: Civil Suit No 22–231 of 1986 (High Court, Temerloh)

Malik Imtiaz Sarwar (Arthur Wang Ming Way) (Arthur Wang, Lian & Assoc) for the appellant.
Syed Sharhani Ahmad (Syed & Assoc) for the respondent.

Richard Malanjum JCA (delivering judgment of the court):

INTRODUCTION

[1] Before us is an appeal against the decision of the High Court sitting at Temerloh, Pahang granting the respondent the following orders, namely:

(1) The second defendant (that is the appellant before us) is to effect the retransfer of the land to the plaintiff failing which assistant registrar of High Court Temerloh shall execute all relevant documents necessary to

carry out into effect the retransfer. The first defendant shall repay the full consideration (RM32,000) for the sale of the land to the second defendant. The interests 8% pa shall be imposed on the consideration from the date of transfer (6 June 1983) to final payment.

(2) The first defendant shall pay the costs of this suit to plaintiff and second defendant.

[2] Unfortunately no written judgment was rendered by the learned judge prior to his retirement.

[3] What we have before us now are the notes of proceeding and some of the documents tendered during the trial. Hence when the appeal came up for hearing we were tempted to promptly order a retrial.

[4] But on further perusal of the appeal record and having heard the submissions of learned counsel for the parties including the fact that they left it to this court to decide on the issue of retrial but at the same time stating the disadvantages of having it, we were and are convinced that basically the primary issues involved are questions of law requiring no or minimum findings on disputed facts. And even on factual matrix we are of the view that demeanour of witnesses plays no or minimal role. Hence the question of absence of appreciation of the evidence by the trial judge should hardly arise.

[5] In our view the undisputed facts and admitted facts together with the documentary evidence tendered during the trial are more than sufficient materials upon which the answers to the issues raised by the respective parties could be found thereby determining the fate of the orders granted by the trial court. Indeed neither of the parties ever raised the issue of being prejudiced by the absence of a written judgment from the trial court. And for that we are reminded of what Edgar Joseph Jr SCJ said in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 at p 724:

> A denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affairs of others to complain.

[6] Further, we are conscious of the fact that the respondent is now an old man of over 90 years. A retrial would therefore serve no purpose other than to cause further delay and injustice to the parties since the case was filed in 1986. Thus, for the foregoing reasons we find no valid ground to order a retrial.

THE BACKGROUND FACTS:

[7] This is rather a sad and unfortunate case. The basic facts of this case as we can gather form from the notes of proceeding and the documents available are as follows.

[8] The respondent is an illiterate old man. He had a piece of land held under EMR 434, Lot No 905 measuring a little over three acres ('the subject land'). It is situated in Karak, in the Mukim of Sabai, Bentong District, in the State of Pahang. A

[9] Sometime in 1981 he was approached by one Simanca a/l Juggiah together with a person by the name of Marimuthu s/o K Pallaniappan who is the first defendant in this case. The meeting was in connection with the interest of the first defendant to develop the subject land into a housing estate. The respondent agreed with the proposal. An agreement ('the Agreement') was therefore executed between the respondent and the first defendant in which the former would be allotted 'a net figure of 20% of all the completed units with shop houses, terrace and semi detached houses'. B C

[10] Although acknowledging that he did affix his thumb prints on the Agreement in 1981, the respondent said that the contents thereof were never explained to him. He denied ever meeting any lawyer in Kuala Lumpur to sign any document. He also said that he never met a Chinese lawyer in connection with the subject land. D

[11] In respect of the two powers of attorney purportedly given by him to the first defendant, the respondent denied ever giving any, let alone the power to sell and transfer the subject land. E

[12] Upon knowing that the subject land had been transferred to a third party the respondent went to see a lawyer for assistance. He also lodged a caveat on 15 May 1986 against the title of the subject land. This instant action under appeal was also filed seeking for the return of the subject land to him. F

[13] From the notes of proceeding it is clear that the respondent had consistently maintained that he never sold the subject land, never signed the borang 14A and never received any payment of its value.

[14] During the trial, the first defendant also gave his account of the events. He testified that he agreed with the respondent to develop the subject land on a joint venture basis. An agreement between the respondent and his firm, Syarikat East Coast Company, was therefore prepared and signed. It was one of the terms in the Agreement that upon its execution the respondent had to hand over the issued document of title in respect of the subject land to the office of M/s Paul F Decruz & Co the solicitor who attested their signatures in the Agreement. G H

[15] And it was also the evidence of the first defendant that since he did not have the money to pay for the surveyor's fee in connection with the application for the subdivision of the subject land he had to take a loan using the subject land as the security. We note that there is no provision in the Agreement which allowed the first defendant or his firm to use the subject land as a security for any loan prior to the issuance of separate subdivided title deeds. Even at that I

stage the agreement provided that it was the respondent who would execute any relevant legal charges. There was no mention of any power of attorney to be given to the first defendant by the respondent.

[16] However the first defendant claimed to have told the respondent about his intention to take a loan in order to develop the subject land. Hence, he managed to find a lender for the sum of RM30,000 with the help of one Kandasamy (DW2). And in order to secure the loan he went to the office of one Cheong Tian Fook together with Kandasamy and the respondent where only a clerk attended to them. He was made to sign a set of blank forms but he could not remember the nature of those forms. He denied knowing that those were transfer forms. When shown the borang 14A the first defendant admitted that the signature found therein was his. He also said that when he signed the forms the respondent was present at the request of Cheong Tian Fook. But at that time the name of the respondent was not inserted in the forms. As for the issued document of title he gave it to DW2 before he signed the set of forms. Obviously it would appear that the term in the Agreement relating to the security and retention of the issued document of title was not observed. The first defendant also testified that he only received RM24,000 or RM25,000 from the total loan since there was an immediate deduction for interest which was at the rate of 5% per month.

[17] Notwithstanding the absence of any provision in the Agreement in which the respondent was contractually obliged to execute a power of attorney in favour of the first defendant or any other party, it was also the evidence of the first defendant that he secured two powers of attorney from the respondent appointing him as his attorney. The first was in relation to the development of the subject land while the second was in connection with the loan. In respect of the second, the first defendant said that he was just following the instruction of DW2 since he needed the loan badly. But the first defendant admitted that the respondent did not sign the second power of attorney in Cheong Tian Fook's office but in the office of Sodhy & Ang. Due to the economic recession he could not pay back the loan resulting in the transfer of the subject land to the appellant which was never his intention in the first place.

[18] Subsequently he went to the office of the appellant twice with a view to have the subject land retransferred to the respondent. During the first visit he was asked to pay RM30,000 but on the second visit a sum of RM200,000 was demanded on the ground that with the development of the surrounding lands the value of the subject land had also appreciated.

[19] As for the proposed development of the subject land the first defendant disclosed that the Pahang State Government rejected the development proposal. Unfortunately he could not produce any rejection letter.

[20] Mr Lee Siew Chu (DW1) gave evidence for the appellant. DW1 said that initially she purchased the subject land together with one Chai Sai Eng

vide an agreement dated 30 June 1982 (D2). At that time the appellant was yet to be incorporated. It took her nine months after the purchase to register the appellant. Hence she only signed the borang 14A in March 1983 and thus the date inserted was 9 March 1983.

[21] DW1 went on to state the following, *inter alia*:

(i) that she did not know the respondent though she knew that he was the former registered owner of the subject land;

(ii) that during the negotiation for the sale she did not deal with the respondent. She dealt with the first defendant since he had the power of attorney. It was the first defendant who sold the subject land to her and Chai Sai Eng;

(iii) that she used the services of a lawyer by the name of Cheong Thiam Fook, in the purchase of the subject land;

(iv) that she paid RM32,000 for the subject land;

(v) that in her presence the first defendant signed the agreement (D2) and the borang 14A. The respondent was not present;

(vi) that at the time of signing the documents the first defendant also gave the power of attorney to her lawyer;

(vii) that she was informed by her lawyer that since the first defendant had the power of attorney he could sign both the documents;

(viii) that initially she did not know the first defendant. It was Chai Sai Eng who came to know him through a broker; and

(ix) that the lawyer who handled the transaction had migrated and was no longer in practice.

[22] We also note that D2 made no reference to any power of attorney or the fact that the first defendant was acting as the attorney for the respondent.

[23] Similarly the borang 14A dated 9 March 1983 was signed by the first defendant with no indication that he was doing so as the attorney for the respondent. There was thus no reference to any power of attorney, not even an indication of a power of attorney which has complied with s 4 of the Powers of Attorney Act 1949.

THE APPEAL — ISSUES FOR DETERMINATION

[24] Before us, learned counsel for the appellant submitted that the orders of the trial court should be reversed for the following reasons, in summary:

(i) that his client had acquired an indefeasible title to the subject land vide the borang 14A which was signed by the first defendant as the attorney for the respondent;

(ii) that it was not alleged by the respondent that the act of the first defendant in signing the borang 14A was outside the scope of his powers as the attorney and that it was done with a view of cheating him. The case of *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23 was referred;

(iii) that the Land Office had registered the borang 14A;

(iv) that the omission of any reference to the power of attorney in the borang 14A was just an irregularity since the first defendant did have the power to sign it in the first place;

(v) that the failure to register or deposit the power of attorney with the Land Office at the time of the transfer was not fatal. The Land Office would be able to rectify the process, The case of *Choo Ah Kow v Yeow Yew Thiam* [1989] 1 MLJ 187 and *Mohamed bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 were cited in support of the proposition;

(vi) that the case for the respondent rested squarely on the allegation of forgery and not on insufficient or void instrument which is a separate and distinct ground albeit housed together with forgery in sub-s (2)(b) of s 340 of the National Land Code ('NLC'). There was no prayer for a declaration to invoke this second limb of the subsection. The respondent should not go beyond his pleaded case. The case of *State Government of Perak v Muniandy* [1986] 1 MLJ 490 was relied on in support;

(vii) that the respondent had ratified the sale of the subject land by the first defendant to the appellant as evidenced by the ratification agreement signed by the respondent and the first defendant and the telegrams sent by the respondent or his agent to the first defendant;

(viii) that the appellant was in no way involved or implicated in the alleged forgery of the borang 14A; and

(ix) that the appellant was a bona fide purchaser for value and thus entitled to claim indefeasibility of title or interest in the subject land. The cases of *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 and *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 were cited as the authorities as well as sub-s (3) of s 340 of NLC.

[25] Learned counsel for the respondent in his rebuttal basically submitted the following:

(a) that his client's case was based on forgery in which the appellant was not required to be a party. Hence the issue of fraud did not arise;

(b) that the borang 14A was not signed by the first defendant as the attorney for the respondent;

(c) that the concept of bona fide purchaser for value in sub-s (3) of NLC applies only to a subsequent purchaser and not to an immediate purchaser;

(d) that the question of ratification should not arise since the purported ratification agreement was never marked as an exhibit during the trial; and

(e) that even the first defendant admitted that the respondent did not know about the transfer and the signature in the borang 14A purporting to transfer the subject land.

[26] Now, having perused the appeal record and the notes of proceeding and having heard the submissions of learned counsel for the parties we are of the view that the basic questions to ask in this appeal are these:

(i) What was the status of the signature of the first defendant in the borang 14A?

(ii) Whether the first defendant in fact signed the borang 14A as the attorney for the respondent pursuant to the power of attorney?

(iii) That if the appellant had acquired the title or interest in the subject land through a forged instrument, could it not rely on the doctrine of *bona fide* purchaser for value housed in the proviso to s 340 (3) of NLC? and

(iv) Whether the ratification agreement entered into by the first defendant with the respondent is of any assistance to the appellant to maintain its title or interest on the subject land.

QUESTION (1)

[27] There was no dispute that the signature of the transferor appearing in the borang 14A did not belong to the respondent. At any rate the denial of the respondent was unchallenged. (See *Gian Singh & Co Ltd v Banque De L'indochine* [1974] 2 MLJ 177 PC). Hence, in truth the respondent never signed the borang 14A for the purpose of transferring the ownership of the subject land to the appellant. Accordingly the instrument of transfer, that is the borang 14A, was insufficient and void when it was presented for registration, a distinct vitiating factor to the doctrine of indefeasibility of title as provided under s 340 of NLC. However that was not the pleaded case of the respondent. Hence we do not intend to dwell into that point or the implied view of immediate indefeasibility as expressed albeit obiter in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85.

[28] Meanwhile the first defendant admitted that the signature found in the borang 14A purporting to be the transferor was his own signature. DW1, a director of the appellant, did not dispute the claim. Instead she admitted and confirmed that she was present when the first defendant signed the borang 14A. Thus on plain reading of the borang 14A that bore the signature of the first defendant and presented for registration, the inevitable conclusion would be

that the signature represented to the whole world that it belonged to the respondent. Obviously the Land Office perceived that to be the case when the borang 14A was accepted for registration. Without the signature the instrument would have been incomplete. In our judgment therefore the insertion of his signature by the first defendant without more and thus representing to be the transferor is a plain forgery. Hence s 340(2)(b) of the NLC is relevant and applicable. (See *Chiew Lip Seng v Perwira Habib Bank (M) Bhd* [1999] 1 MLJ 310; Dr David Wong, *Tenure and Land Dealings in the Malay States* at p 361; *OCBC Bank (M) Bhd v Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 MLJ 511).

[29] Accordingly the title or interest of the appellant in the subject land would not be indefeasible on account of the forged signature in the instrument of transfer. Section 340 of the NLC reads:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) *The title or interest of any such person or body shall not be* indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) *where registration was obtained by forgery*, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law (Emphasis added).

[30] On the above ground alone that this appeal should be dismissed.

QUESTION (II)

[31] While not denying that the author of the signature in the borang 14A was the first defendant, the appellant however strenuously asserted that the first defendant signed on it as the attorney for the respondent and that the omission to refer or include the power of attorney was not fatal to its registration.

[32] The respondent however gave evidence protesting against the assertion that he had given the power of attorney to the first defendant. Unfortunately for the respondent it was in evidence as exhibits two such powers of attorney duly executed by him and there was no challenge as to their authenticity. And it is in the second power of attorney that the power to sign the borang 14A is asserted.

[33] The pertinent question therefore is whether on the balance of probabilities the assertion by the appellant could be accepted as true based on the evidence, oral and documentary, and the surrounding circumstances at the material time.

[34] From the relevant documentary evidence we note the following:

(a) Other than the signature is attested by a solicitor there is nothing else in the borang 14A to indicate that the first defendant did sign it as the attorney for the respondent. Not even the registration number of the power of attorney was stated as should have been done if indeed the borang 14A was signed by the attorney of the transferor. Such number would have been available since it was mentioned in the ratification agreement dated 16 April 1985 (AB p 8–9) entered into between the respondent and the first defendant that a power of attorney dated 22 February 1982 appointing the latter as the attorney of the former had been deposited with the High Court Registry Kuala Lumpur;

(b) D2 did not make any reference to any power of attorney although the signatures therein were attested by the same solicitor who did the attestation in the borang 14A. The respondent's name was inserted as the vendor while the signature was that of the first defendant without any mention of his capacity in so doing; and

(c) The ratification agreement did not state that the first defendant was exercising his powers as the attorney for the respondent when he transferred the subject land to the appellant.

[35] From the oral testimonies of witnesses there were crucial and startling disclosures made, for instance:

(i) the first defendant (DW3) testified that although he signed a set of forms in the office of a lawyer by the name of Cheong Tian Fook no lawyer was present at that time. He was only attended to by a female clerk named Shirley who did not explain the nature and contents of those forms to him. This piece of evidence was not challenged. Neither the lawyer nor the clerk was called to rebut this assertion. The first defendant went on to say that his intention was only to get the loan which was arranged by one Kandasamy (DW 2). He never intended to transfer the subject land to anyone and it was his understanding that the second power of attorney did not empower him to do such act;

(ii) DW2 in his evidence said that the purpose of the first defendant signing the forms was for a loan. There was no sale involved. This witness also testified that he did not know the contents of the forms when the first defendant signed on them;

(iii) SP1, En Zainal bin Abidin, the Penolong Pegawai Daerah (Tanah) Jabatan Tanah Bentong said that the transfer of the subject land had no connection with any power of attorney since no reference was made to any, not even a registration number of a power of attorney. According to this witness the borang 14A was not preceded by the power of attorney or accompanied by it when it was sent for registration. SP1 went on to say that the transfer was done through the services of a lawyer whose attestation of the signature appearing therein would clear any doubt that it belonged to the transferor. It was also the evidence of this witness that his office would have rejected the borang 14A if the signature therein was known to be not that of the respondent; and

(iv) DW1 in her evidence said that she was advised by her lawyer that the first defendant could sign the documents in respect of the sale of the subject land as he was the attorney of the respondent.

[36] The documentary evidence is self-evident. (See *Cheong Khean Sheng v Public Prosecutor* [1970] 2 MLJ 175). There was absolutely no reference to any power of attorney *vis-a-vi*s the signature of the first defendant in the borang 14A. Thus, our conclusion is that it would be inconceivable to say that when the first defendant signed on the borang 14A he was exercising his power as the attorney of the respondent. The oral evidence also supports such a conclusion. Based on the evidence of the first defendant it could not be said that when he signed the borang 14A he had the power of attorney in mind or that he was doing so as the attorney of the respondent. Hence if the signatory himself did not assert such a fact it would be unjustified to conclude or even assume without further proof that he did.

[37] We are further convinced in our conclusion by the fact that after the registration of the borang 14A the appellant or DW1 made no attempt to rectify the process by forwarding the power of attorney to the Land Office or took such other action indicative of what is now asserted. Indeed it was the evidence of DW1 that after the registration she had a peaceful possession of the subject land until she was served with the writ of summons of the respondent. In other words she was quite contented with the status of the signature of the first defendant as found in the borang 14A.

[38] Of course she could argue that she left the matter with her lawyer to deal. But her lawyer was her agent. And the general rule is that the knowledge of a solicitor is the knowledge of his client thereby depriving a client of the plea of lack or absence of knowledge due to the failure of his solicitor to disclose the true facts to him. (See *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85). Thus, we do not think such argument is of any help to the appellant.

[39] Learned counsel for the appellant relied quite heavily on the case of *Mohamed bin Buyong v Pemungut Hasil Tanah Gombak & Ors* (supra) to buttress his contention that any error as found in the process of registering the borang 14A could be rectified.

[40] With respect we are unable to agree that the cited authority can be of help to the case of the appellant. The basic difference is the purpose of the rectification. In the case of *Mohamed bin Buyong* (supra) it was to halt the perpetuation of errors or omissions committed. In the instant case to rectify the process would produce a contrary result. Indeed it was the evidence of SP1 that the borang 14A should not have been registered as it was not in order.

[41] Further in *Mohamed bin Buyong* (supra) the office copy of the power of attorney was submitted together with the relevant borang 14A. It was also not in dispute that the registration number of the power of attorney was given. The errors were that it was subsequently shown that the power of attorney was never signed by the purported donor and that at the time of presenting the borang 14A the issued document of title was missing. In the instant case the power of attorney was never given to the Land Office whether before or at the time of presenting the borang 14A for registration. There was also no evidence adduced to indicate that the Land Office was informed of the true status of the signature of the first defendant.

[42] In fact, from the evidence of SP1 it would appear that based on the documents presented the impression given was that the signature found in borang 14A belonged to the respondent. Moreover it was never shown that the power of attorney complied with the requirements of the Powers of Attorney Act 1949 including its registration with the court's registry. But we are not inclined to consider this aspect of the power of attorney as it would be going beyond the pleaded case of the respondent.

[43] Our answer to question (ii) is therefore in the negative.

QUESTION (III)

[44] The term '*bona fide* purchaser' has been used in a host of cases. Simply put it means a buyer in good faith. And the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction. But the overriding consideration is 'the particular circumstances of each case'. (See *Pekan Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; *Ong Ban Chai & Ors v Seah Siang Mong* [1998] 3 MLJ 346).

[45] In the instant case there are at least three crucial facts or circumstances that warrant consideration, namely the undisputed signature of the first defendant in the borang 14A, the admission by DW1 that she was present when the first defendant signed the document and the availability of the services of a solicitor to DW1.

[46] But even before coming to any conclusion on the issue we note that in its statement of defence the appellant did not plead or rely on the doctrine of *bona fide* purchaser for value. As such there is therefore no necessity for us to deal with the issue. We are guided by the basic procedural principle in that a party in a suit is bound by its own pleadings. (See *State Government of Perak v Muniandy* (supra).

[47] But even if we were to consider that aspect of the submission of learned counsel for the appellant our answer would be in the negative. The simple reason is that DW1 who was then the actual person who concluded the transaction knew of the falsity of the signature of the first defendant as found in the borang 14A since she was present at the time it was put down. She was aware of the deceit involved and practiced upon not only to the respondent but also to the Land Office. Yet DW1 and her solicitor at that time allowed it to happen and in fact benefited from such deception and falsity. Reliance upon the power of attorney is not the answer. We have already made our conclusion on that issue. Hence being the 'nominee' of DW1 as pleaded the appellant should not and could not be heard to cry for the invocation of the proviso to s 340(3) of the NLC.

QUESTION (IV)

[48] Reliance on the ratification agreement was also not the pleaded case of the appellant. In fact the statement of defence only relied on one issue, namely, that the first defendant was the attorney of the respondent. Thus we are not obliged and should not make any conclusion on this issue otherwise we would be venturing into an area that was not properly before the trial court. (See *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143).

[49] At any rate we do not find the ratification agreement is of any assistance to the appellant. Firstly, it was not a privy to it. It may only be relevant due to

the purported acknowledgment therein by the respondent of the transfer of the subject land to the appellant. But the acknowledgement itself did not indicate that the respondent also acknowledged that the transfer was done properly by his attorney. Secondly, we find the terms in the said agreement conflicting. Even with the benefit of hindsight it was never expressed that the first defendant acted as the attorney of the respondent when he signed the borang 14A or that he was exercising his power under the power of attorney. Thirdly, if indeed the respondent agreed and consented to the transfer it was not stated the reason or ground for the demand of retransfer. And the promise by the first defendant to endeavour to secure the retransfer would also have been unnecessary. Accordingly in our view the terms in the said agreement only strengthened the assertion that when the borang 14A was signed by the first defendant something was amiss and known to those involved.

CONCLUSION

[50] We have considered the other points raised by learned counsel for the parties in the course of hearing this appeal. We do not think our views on them would have any effect on the overall conclusion that we have arrived at in this appeal.

[51] Accordingly for the reasons given above we are inclined to dismiss this appeal and affirm the decision and orders of the High Court as given. We also order costs to the respondent in this appeal to be taxed. Deposit is to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Reported by Izzaty Izzuddin